

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO.22 OF 2005

Akruti Nirman Ltd.

... Petitioners

v/s

Lallubhai Amichand Ltd.

... Respondents

Mr Ravi M. Kadam with Mr P.K. Shroff and Mr S. Joshi

i/b M/s Pandya and Poonawala for Petitioners.

Mr Janak Dwarkadas with Mr Chetan Kapadia and Mr N.

Dhruva i/b M/s M. Dhruva and Co. for Respondents.

CORAM : D.K.DESHMUKH J.

DATE : 20TH JANUARY 2005

P.C.: -

1. This petition is filed under section of the Arbitration and Conciliation Act 1996. By this petition, the petitioners seek an order of temporary injunction restraining the respondents from selling or creating third party rights in respect of Development Rights Certificate (hereinafter referred to as 'DRC') No.435 dated 28th October 2004 and DRC No.436 dated 28th October 2004 and also restraining the respondents from applying to the Bombay Municipal Corporation for recording any purporting transfer or for deducting any DRC. The claim of the petitioners is based on memorandum of understanding dated 12th June 2003 and memorandum of understanding dated which is undated but parties had agreed to reduce in writing on 19th August 2003. It appears that the respondents owned a piece of land which was to be surrendered to the Mumbai Metropolitan Region Development Authority (hereinafter referred to as 'MMRDA') and on surrender of the land, the respondents were to get TDR and DRC in lieu of that land. It appears that the land was mortgaged to Union Bank of India. The role of the petitioners was that they had expertise in surrender of lands to MMRDA and getting TDR and DRC in lieu of that land from that authority and under the first memorandum of

understanding, the petitioners had deposited an amount of Rs.50,00,000/- with the respondents. It was agreed between the parties that the first DRC of total 85 % of the entitlement would be secured, out of that 75 % would be in the name of said Bank, 10 % would be in the name of respondents and 15 % would be in the name of petitioners. The balance 15 % DRC was to be again divided between the petitioners and the respondents in the ratio of 85 % to the respondents and 15% to the petitioners. It is common ground that this balance 15 % DRC has not yet been released. It is also common ground that out of first 85 % DRC, 80 % DRC has been released. DRC No.435 has been issued in the name of Bank itself and DRC No.436 is issued in the name of respondents and that 15 % share of DRC has been issued in the name of petitioners. The temporary injunction that the petitioners are seeking is to restrain the respondents from transferring DRC No.436 which has been issued in favour of the respondents and any part of DRC that may remain from DRC No.435 after satisfying the claim of the Bank. It appears that there was a second memorandum of understanding entered into between the parties dated 19th August 2003 for payment to the extent of Rs.3,00,00,000/- by the petitioners on behalf of the respondents to the workers and that payment was to be recovered by the respondents from the sale of DRC.

2. The case of the petitioners is that the petitioners paid Rs.50,00,000/- to the respondents as mentioned in the first memorandum of understanding, Rs.2,25,00,000/- under the second memorandum of understanding and that the petitioners have also paid an amount of Rs.81,00,000/- on behalf of the respondents to one Atithi Builders and Constructions Pvt.Ltd. for withdrawal of the suit filed by the said Atithi Builders. According to the petitioners, the petitioners are thus entitled to recover all these amounts from the respondents. According to the petitioners, their claim is for specific performance of the memorandum of understanding for the DRC to which the petitioners are entitled as also for recovery of the amounts from the respondents which have been paid by the petitioners. The defence of the respondents is that the petitioners are not entitled for temporary injunction as sought because as per the agreement between the parties, an amount of Rs.50,00,000/- which is to be paid by the respondents to the petitioners is from the sale proceeds of DRC No.436. Similar is the case with the amount of Rs.2,25,00,000/- which has been paid by the petitioners under the second memorandum of understanding. The learned counsel appearing for respondents stated before me that without prejudice to his client's rights, claims and contentions, the respondents are willing to deposit an amount of Rs.3,00,00,000/- in case the petitioners

sell DRC No.436 and any part of DRC No.435. According to the respondents, the petitioners themselves are guilty of breach of first memorandum of understanding itself. According to the respondents, the petitioners have committed breach of the condition contained in clause 17B of the first memorandum of understanding. The respondents deny that the amount of Rs.81,00,000/- which the petitioners claim to have paid on behalf of the petitioners to Atithi Builders is recoverable under the two memorandums of understanding. According to the respondents, Rs.81,00,000/- is subject matter of third memorandum of understanding between the parties which does not have any arbitration clause. I have heard learned counsel for both the sides in detail. I have gone through the record. Clause 15 of the first memorandum of understanding deals with the entitlement to DRC by each of the party. That clause reads as under

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"15. In the circumstances aforesaid, initially there will be 3 DRC for 85 % of total entitlement to be obtained one in the name of the Bank for 75 % of the TDR initially allotted and from the remaining 25 %, 10 % shall be in the name of the Owner and 15 % in the name of the Joint Venturer. The subsequent DRC for the remaining 15 % shall be

issued in the name of Owner and Joint Venturer in the ratio of 85 % and 15 % respectively. "

. The next clause that is relevant is clause 17(a) which reads as under :-

"17(a) Whenever required and called upon by the Owner, the Joint Venturer shall deposit with the Owner a sum of Rs.50,00,000/- (Rupees Fifty lacs only) which shall be repaid without interest by the Owner to the Joint Venturer from the first realisation by the Owner from the sale of DRC (other than the DRC to be obtained in the name of Bank)."

. It is common ground before me that against 85 % of the first entitlement of DRC 80 % has been issued out of which three DRCs were issued. The first DRC No.435 is issued in favour of Union Bank of India. Out of that DRC, the Bank is entitled to receive proceeds so as to satisfy its claim. If anything remains in balance from DRC No.435, the respondents are entitled to sell it and DRC No.436 has been issued towards the share of the respondents and there was one more DRC issued in favour of the petitioners representing their share. Thus, the only claim of the petitioners can be against the first memorandum of understanding is refund of Rs.50,00,000/-

as per clause 17(a) quoted above. That payment was to be made by the respondents after selling his share of DRC from first 85 % share of DRC which was to be released. Obviously therefore, the petitioners cannot seek temporary injunction restraining the respondents from selling their share of DRC. The next aspect which is relevant is contained in clause 2 of the second memorandum of understanding. Clause 2 reads as under :-

"2. It shall be the responsibility of the Owner to pay and discharge further liability and / or claims of their former workers and to arrive at suitable and satisfactory arrangement and whereby the Owner is not prevented from discharging their obligations under the said Memorandum of Understanding expeditiously. For the purpose after the Owner arrive at a suitable arrangement with the Union and if and when called upon by the Owner, the Joint Venturer shall pay or procure within one week of such demand, a sum to the extent of Rs.3,00,00,000/- (Rupees Three Crores only) against the future entitlement of TDR coming to the share of the Owner excluding the TDR to be earmarked for Union Bank of India."

. Perusal of the above clause shows that even this amount was secured by the payment that the respondents were to get on sale of DRC from first entitlement of 85 % share of DRC. Thus, even this amount appears to have been secured by the respondents to the petitioners on sale of DRC No.436 and if any balance remains, out of DRC No.435. In this view of the matter therefore, the petitioners cannot seek an order of temporary injunction restraining the respondents from transferring DC No.436 and DRC No.435. In any case, the respondents have made the above statement that in case respondents transfer DRC No.436 or any portion of DRC No.435, the respondents will deposit an amount of Rs.3,00,00,000/- in Court. In my opinion, that will secure the amount of Rs.2,25,00,000/- paid by the petitioners under the second memorandum of understanding and Rs.50,00,000/- paid under the first memorandum of understanding. So far as the payment of Rs.81,00,000/- is concerned, it is clear from the memorandum of understanding dated 2nd July 2004 that that payment appears to have been made under that memorandum of understanding. The memorandum of understanding dated 2nd July 2004 is a separate transaction and in that memorandum of understanding, there does not appear to be any arbitration clause. it further appears that the agreement is between M/s Hiranandani Akruti JV which is said to be a consortium of parties and the petitioners.

In my opinion, it will not be appropriate to make any order in relation to Rs.81,00,000/- which is subject matter of memorandum of understanding dated 2nd July 2004 because it appears that there are other persons involved in that transaction. In these circumstances therefore, in my opinion, following order would meet the ends of justice.

3. It is the case of the respondents that the respondents have already sold whatever was transferable by the respondents from out of DRC No.435. The respondents shall deposit an amount of Rs.50,00,000/- in this Court within a period of four weeks from today. So far as the DRC No.436 is concerned, the respondents shall deposit the balance amount of Rs.2,50,00,000/- within a period of three months from today. However, in case the respondents complete transfer of DRC No.436 earlier, then the amount of Rs.2,50,00,000/- shall be deposited by the respondents within a period of two weeks from the date of completion of transfer of DRC No.436. The respondents are directed to file an undertaking in this Court within a period of one week from today, undertaking to perform the above obligations. Petition is disposed off.

. Parties to act on the copy of this order duly authenticated by the Company Registrar / Personal

Secretary as true copy.

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Certified copy expedited.
